UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AMY ANSTEAD,

Plaintiff,

v.

VIRGINIA MASON MEDICAL CENTER, *et al.*,

Defendants.

CASE NO. 2:21-cv-00447-JCC-JRC

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO QUASH SUBPOENA OF JAMIE LITVACK, M.D.

This matter is before the Court on referral from the district court (Dkt. 11) and on non-party movant Jamie Litvack, M.D.'s motion to quash a subpoena directed at herself. Dkt. 113.

In this employment dispute, defendants propounded a subpoena on Dr. Litvack seeking information plaintiff had shared with her regarding her employment with defendants, the present case, and a similar case in which Dr. Litvack was a party. Dr. Litvack asks the Court to step in to resolve the parties' dispute over whether defendants are entitled to certain documents she seeks via the subpoena. Specifically, Dr. Litvack argues that she should not be required to comply because the documents are more readily obtainable from plaintiff; because the documents are irrelevant; because one request is vague and ambiguous; and because some requests seek privileged information.

Considering all of Dr. Litvack's objections, the Court concludes that defendants have met their burden of showing that some of their requests must be stricken because of vague language and their demand for privileged documents, but not that the subpoena as a whole must be quashed. Therefore, her motion is granted in part and denied in part.

BACKGROUND

Plaintiff initiated this action on April 2, 2021 when she filed a complaint alleging that defendants violated her rights under the Family and Medical Leave Act, Washington Law Against Discrimination, the Americans with Disabilities Act, Title VII, and Washington's Equal Pay and Opportunities Act. Dkt. 1 at 5–9. Plaintiff alleges that defendants discharged her or "otherwise limited her employment opportunities based on discriminatory motivations, including exaggerated fears and discomfort about [p]laintiff's disability and unfounded assumptions about how [her] disability would impact her work performance." *Id.* at 6.

The parties have engaged in substantial discovery. *See* Dkt. 29 at 2. However, the parties disagree as to whether defendants are entitled to discovery concerning documents and communications shared between plaintiff and Jamie Litvack, M.D. *See* Dkt. 113, at 2. Dr. Litvack was not an employee of defendants' hospital but, rather, another doctor specializing in the same area as plaintiff who pursued a discrimination claim against her employer, the University of Washington. Dkt. 120-1, at 2. During her deposition on December 14, 2022, plaintiff identified Dr. Litvack as an individual with whom she shared documents and information related to pursuing a gender discrimination claim. Dkt. 114-1, at 9–10. In their respective lawsuits, both plaintiff and Dr. Litvack have been represented by the same law firm. Dkt. 120-1, at 8.

On January 24, 2023, defendants served Dr. Litvack with a subpoena which, in relevant part, ordered her to comply with the following document requests by February 17, 2023:

1. Documents you obtained from Plaintiff that refer, relate, or pertain to the business operations of Virginia Mason, or that otherwise contain Virginia Mason information, including without limitation information about other Virginia Mason employees.

2. Documents that contain Virginia Mason confidential, sensitive, proprietary, and/or trade secret information, whether received from Plaintiff or otherwise.

3. Documents regarding, reflecting, or pertaining to any damages alleged by Plaintiff, including without limitation alleged economic and/or noneconomic damages.

4. Documents regarding, reflecting, or pertaining to Plaintiff's employment with and/or separation from Virginia Mason, including without limitation discussion of Plaintiff's coworkers.

5. Documents regarding, reflecting, or pertaining to Plaintiff's compensation at Virginia Mason.

6. Documents regarding, reflecting, or pertaining to Plaintiff's compensation at any other employer other than Virginia Mason.

7. Documents regarding, reflecting, or pertaining to Plaintiff's medical condition, benefits, leaves of absence, and/or disability.

8. Any documents or communications between you and Plaintiff that relate, pertain, or refer to alleged mistreatment, discrimination, retaliation, and/or unequal treatment of Plaintiff by Virginia Mason.

9. Any documents or communications between you and Plaintiff that relate, pertain, or refer to alleged mistreatment, discrimination, retaliation, and/or unequal treatment of women and/or disabled individuals in the workplace.

10. Any documents or communications between you and Plaintiff regarding this lawsuit.

11. Any documents or communications between you and Plaintiff regarding the separate lawsuit you brought against the University of Washington.

12. Any documents containing patient [protected health information] and/or personal identifying information, which were provided by Plaintiff.

13. Any documents or communications between you and Plaintiff regarding surgical scheduling and/or operating room block time.

14. Any documents or communications between you and Plaintiff regarding on-call or call scheduling.

15. Any documents or communications between you and Plaintiff regarding support staffing levels in a medical setting.

Dkt. 114-3, at 10–11.

Dr. Litvack, through counsel, expressed her objections to the subpoena, and on February 6, 2023, counsel for defendants and Dr. Litvack proceeded to meet and confer telephonically in an attempt to resolve their dispute. Dkt. 114-1, at 3. Shortly following the failure thereof, Dr. Litvack filed the instant motion on February 7, 2023. Both parties have briefed the issues and the matter is ripe for decision. Dkts. 113, 119, 125.

DISCUSSION

Courts maintain broad discretion to control the discovery process. A party is entitled to discovery into matters "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). But a court may limit discovery to protect a party from annoyance, embarrassment, oppression, or undue burden. Fed. R. Civ. P. 26(c)(1). Similarly, a court may modify or quash a subpoena to a third party that presents an undue burden or requires disclosure of privileged or other protected matter. *See* Fed. R. Civ. P. 45(d)(3)(A). "Whether a subpoena imposes an undue burden depends on the relevance of the information requested, and the burden imposed." *Rollins v. Traylor Bros.*, 2017 WL 1756576, at *1 (W.D. Wash. 2017). "The test for 'relevance,' in the context of a Rule 45 subpoena to a non-party, is no different from the test under Rules 26 and 34." *Wells Fargo Bank NA v. Wyo Tech Inv. Grp. LLC*, 385 F. Supp. 3d 863, 873 (D. Ariz. 2019) (citations omitted).

Here, Dr. Litvack, joined by plaintiff, objects to the subpoena on the bases that: (1) the subpoena seeks information protected by attorney-client privilege; (2) the subpoena imposes vague and ambiguous document requests; (3) the subpoena imposes an undue burden; and (4) the subpoena seeks cumulative information that could more readily be obtained from plaintiff. Dkt. 113, at 10–14. Defendants also maintain that Dr. Litvack failed to meet and confer in good faith before filing this motion and that plaintiff does not have standing to support her in bringing the motion. Dkt. 119, at 10, 15.

1. Whether the Meet-and-Confer Requirement Has Been Satisfied

"The purpose of the 'meet and confer' requirement is to minimize the use of the Court's limited resources on matters that the parties *should* be able to resolve without court intervention." *Anglin v. Merchants Credit Corporation*, 2020 WL 4000966, at *2 n. 2 (W.D. Wash. July 15, 2020) (emphasis added). Neither party disputes that a meet-and-confer took place prior to the filing of this motion. Dkt. 114, at 3; Dkt. 119, at 9. Thus, the Court chooses not to evaluate the effectiveness of the parties' conference, and instead turns to the merits of this motion.

2. Whether Standing Exists

Next, defendants aver that plaintiff lacks standing to quash the subpoena against Dr. Litvack on any grounds, save privilege. Dkt. 119, at 5. Given that Dr. Litvack, and not plaintiff, has brought the motion to quash the subpoena, the issue of plaintiff's standing is immaterial, regardless of whether plaintiff supports Dr. Litvack in bringing the motion. *See* Dkt. 113. The Court finds defendants' contention to be without merit.

3. Whether the Information Sought is Protected by Attorney Work Product Privilege

Dr. Litvack contends that the subpoena must be quashed on the basis that it seeks information protected by attorney work product privilege. Dkt. 113, at 11. Specifically, the subpoena seeks "[a]ny documents or communications between [Dr. Litvack] and Plaintiff regarding this lawsuit[,]" and "[a]ny documents or communications between [Dr. Litvack] and Plaintiff regarding the separate lawsuit [Dr. Litvack] brought against the University of Washington." Dkt. 114-3, at 11. Dr. Litvack raises both the attorney-client privilege and attorney work-product privilege as objections to these requests. Dkt. 113, at 11.

Plainly, the attorney-client privilege would not apply to communications between plaintiff and Dr. Litvack, as neither are attorneys. *See United States v. Sanmina Corp*, 968 F.3d 1107, 1116 (9th Cir. 2020) (communication must be between attorney and client to invoke attorney-client privilege). However, the Court agrees that documents and communications related to plaintiff's and Dr. Litvack's respective lawsuits are protected as work product. This question is complicated by the fact that the same attorneys represent both plaintiff and Dr. Litvack. Document Requests 10 and 11 specifically seek communications regarding their respective cases. Dkt. 114-3, at 10. While not every communication between plaintiff and Dr. Litvack is implicated by the work-product doctrine, any communications that contain discussion of their shared case strategies would reveal "attorney impressions" and other insights into the "party's efforts in preparing for litigation." Fed. R. Civ. P. 26(b)(3). The doctrine applies to these communications.

The Court's inquiry does not end there, however, because "[t]he privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239 (1975); *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) ("The work-product doctrine's privileges are waivable.").

"While the attorney-client privilege 'is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege,' work-product protection 'is provided against "adversaries," so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.'" *Sanmina*, 968 F.3d at 1120. The Ninth Circuit has held that "disclosure of work product to a third party does not waive the protection unless such disclosure is made to an adversary in litigation or 'has substantially increased the opportunities for potential adversaries to obtain the information.'" *Id.* at 1121 (quoting 8 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2024 (3d ed. 2020)). "Put another way, disclosing work product to a third party may waive the protection where 'such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.'" *Id.* (quoting *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001)).

Thus, in *United States v. Sanmina Corp.*, Sanmina submitted a valuation report prepared by a law firm to the Internal Revenue Service as part of an audit. 968 F.3d at 1112. The valuation report cited two memoranda authored by Sanmina's in-house counsel in a footnote. *Id.* The IRS issued a summons for the memoranda, leading Sanmina to object on the basis that the memoranda were protected by attorney-client privilege and the attorney work-product doctrine. *Id.* The Ninth Circuit concluded that Sanmina had waived attorney-client privilege and implicitly waived work-product protection, reasoning that Sanmina's provision of documents that made reference to its attorney memoranda "seem[ed] inconsistent with Sanmina's purported goal of keeping the memoranda secret from the IRS." *Id.* at 1124.

Here, plaintiff and Dr. Litvack were two clients of the same law firm and peers in otolaryngology practice, and the sharing of information regarding their respective lawsuits is not

inconsistent in any way with the intent to keep the information secret. Nor was their disclosure to each other likely to substantially increase the opportunities for adversaries to obtain the information. Dr. Litvack's and plaintiff's similar positions as plaintiffs suing their employers for gender-based discrimination—represented by the same attorneys—suggests each doctor had a reasonable expectation that the other would keep such communications and documents confidential. *See Sanmina*, 968 F.3d at 1121 (finding a disclosing party's "reasonable expectation of confidentiality" to be "highly relevant and often dispositive" in finding waiver of the work product doctrine); *United States v. Stewart*, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003) (finding disclosure of protected work product to criminal defendant's daughter did not amount to waiver because defendant did not "substantially increase the risk that the Government would gain access to materials prepared in anticipation of litigation"). Finding no waiver, the Court holds that the subpoena must be quashed insofar as it seeks protected attorney work product. Thus, Document Requests 10 and 11, which seek communications between plaintiff and Dr. Litvack regarding each doctor's respective lawsuit, are stricken from the subpoena.

4. Whether the Subpoena Imposes Vague and Ambiguous Requests

Next, Dr. Litvack argues that the subpoena must be quashed on the basis that some of the requests therein are too vague to provide any notice of what information is sought. Dr. Litvack specifically takes issue with Document Request 2, which seeks all documents that contain "Virginia Mason confidential, sensitive, proprietary, and/or trade secret information, whether received from [p]laintiff or otherwise." Dkt. 114-3, at 10. The subpoena does not provide any definition for the terms "confidential," "sensitive," "proprietary," or "trade secret." *See id.* at 7–9. Defendants offer no response to this argument, simply stating that "[i]t is the recipient's job to locate and produce documents, as Civil Rule 45(e) makes clear." *See* Dkt. 119, at 15. While

defendants are correct that a subpoena requires the recipient to locate and produce documents, the recipient is not required to guess at or deduce the meaning of terms clearly critical to the scope of the search. The Court orders that Request 2 be stricken from defendants' subpoena on the basis that it is too vague to allow compliance.

5. Whether the Discovery Sought is Relevant and Proportional to the Needs of the Case

Next, Dr. Litvack objects to the subpoena on the basis that it imposes an undue burden to produce "marginally relevant information." Dkt. 113, at 9. Dr. Litvack highlights defendants' Document Request 4, seeking "[d]ocuments regarding, reflecting, or pertaining to [p]laintiff's employment with and/or separation from Virginia Mason, including without limitation discussion of [p]laintiff's coworkers[,]" as well as Request 9, seeking "[a]ny documents or communications between you and [p]laintiff that relate, pertain, or refer to alleged mistreatment, discrimination, retaliation, and/or unequal treatment of women and/or disabled individuals in the workplace." Dkt. 114-3, at 10–11. Dr. Litvack asserts that requiring her to "produce any comment, communication, or mention of any employee who worked with" plaintiff, as well as comments "about unequal treatment of women in a different workplace[,]" has little to no bearing on the issues in this case. Dkt. 113, at 9–10.

Defendants, in their response, aver that these document requests are directly related to plaintiff's primary complaints of gender discrimination, defendants' after-acquired evidence defense, and defendants' counterclaims, including the counterclaim that plaintiff breached her employment contract by disclosing confidential information. Dkt. 119, at 9. Defendants note that plaintiff indicated, in her deposition, that she forwarded internal information on VMMC provider productivity and nursing distribution to Dr. Litvack "to show her an example of [. . .] how to demonstrate discrimination using graphs." Dkt. 120-1, at 23–24. These documents included

information about billing revenue and names of each physician in plaintiff's working group, and Dr. Litvack's response indicated that she would forward the information elsewhere with plaintiff's approval. Dkt. 120-1, at 27.

Dr. Litvack claims that defendants have "not shown how the document in question is 'proprietary,' 'confidential,' or 'trade secret' information." Dkt. 125, at 3. In so arguing, Dr. Litvack does not address defendants' position that the messages contained information that was meant to remain within VMMC's computer system, including but not limited to data about other VMMC physicians' billing revenue. Defendants are entitled to examine whether other protected information is present in plaintiff's emails to Dr. Litvack. Such information, if present, would clearly implicate its affirmative defense and counterclaims. Dr. Litvack's contentions to the contrary are unconvincing. On reply, Dr. Litvack attempts to deflect by stating that the number of recipients of exfiltrated information does not matter for the purpose of showing liquidated damages. Dkt. 125, at 4. However, defendants do not seek only liquidated damages—they also seek economic, non-economic, contractual, and exemplary damages. Dkt. 85, at 25. Dr. Litvack has not met her burden of showing that the subpoena should be quashed because it poses an undue burden.

6. Whether the Discovery Would Be Cumulative

Next, Dr. Litvack argues that defendants' subpoena should be quashed on the basis that it seeks information already available from a party—the plaintiff. Dkt. 113, at 6. This contention is supported by the fact that any of the information in Dr. Litvack's possession would have necessarily been provided to her by the plaintiff. Further, Dr. Litvack argues that the ESI protocol to which the parties have stipulated will result in the production of all outstanding exfiltrated information.

Dr. Litvack's reference to the ESI protocol is misleading. That protocol is meant to ensure the timely production of relevant information contained in 12 hard drives which plaintiff admitted were in her possession. *See* Dkt. 111. The language to which the parties stipulated, and which this Court adopted in its order, provides that the protocol "does not include files in plaintiff's personal email account or text messages[.]" *Id.* at 9.

Further, while Dr. Litvack may have some basis for contending that the emails could be obtained from plaintiff and not herself, defendants maintain that plaintiff's discovery conduct, thus far, does not support the assertion. In August 2021, in their first set of interrogatories and requests for production, defendants requested documents and communications between plaintiff and any other party regarding the allegations in the complaint, plaintiff's claims against defendants, the facts related thereto, and any instance where plaintiff raised concerns as to unfair treatment by defendants. Dkt. 120, at 2. Plaintiff's response to this request included four email threads between herself and Dr. Litvack. *Id.* In response to a January 2023 request for production of communications between plaintiff and Dr. Litvack, plaintiff produced only one additional email between herself and Dr. Litvack. *Id.* Aside from these five email threads, plaintiff has not produced any other communications between herself and Dr. Litvack responsive to defendants' requests.

To be sure, Dr. Litvack's argument that the request is burdensome is not an admission that a great volume of other documents exists. *See* Dkt. 113, at 9–10. Defendants argue that the documents produced thus far tend to indicate that plaintiff and Dr. Litvack had an ongoing dialogue regarding the issues in this case; in particular, defendants note that some emails contain only forwarded documents with no other context. Dkt. 119, at 8. Defendants have reason to

believe that other communications may contain more relevant information. The discovery sought is not cumulative in light of plaintiff's prior discovery conduct.

Further, and more importantly, whether the information is also in plaintiff's possession is not the complete picture. The possibility that plaintiff not only obtained, but then forwarded, information from defendants' computer system is material to defendants' affirmative defense and counterclaims. The affirmative after-acquired evidence defense is premised on defendants' contention that they would have fired plaintiff had they known of her improper handling of defendants' information. *See* Dkt. 85. If plaintiff obtained protected information and then, through email, disseminated the information to not only Dr. Litvack but other physicians across the country with no way to ensure the security of that information, it would bear directly on this affirmative defense. This would also clearly bear on defendants' alleged damages stemming from its counterclaims. Plaintiff has argued that defendants have not shown damages stemming from their counterclaims; clearly, if defendants can show that sensitive information was not only exfiltrated and kept in plaintiff's possession but shared widely without any safeguards in place, it would change the equation. *See* Dkt. 78, at 8. This factor further precludes the Court from holding that such discovery would be cumulative. Therefore, Dr. Litvack's motion to quash this request is denied.

CONCLUSION

Dr. Litvack's motion to quash the subpoenas is GRANTED in part and DENIED in part. Specifically, the motion is granted as to Document Requests 2, 10, and 11, and denied as to all other document requests. Because the Court grants in part and denies in part Dr. Litvack's motion, the Court denies both parties' requests for fees and costs in litigating the motion. Each party shall bear their own fees and costs.

Dated this 16th day of March, 2023.

J. Richard Creatura
United States Magistrate Judge